

Statement of Timothy R. Petty, Ph.D.
Assistant Secretary for Water and Science
U.S. Department of the Interior
Before the
Committee on Indian Affairs
U.S. Senate
On
S. 3019, Montana Water Rights Protection Act

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Chairman Hoeven, Vice Chairman Udall and members of the Committee. My name is Tim Petty, and I am the Assistant Secretary for Water and Science at the Department of the Interior (Department). I am pleased to appear before you today to provide the Department's position on S. 3019, the Montana Water Rights Protection Act. The Department supports the goals of S. 3019, but has concerns about the bill as introduced. We have reached agreement with the Confederated Salish and Kootenai Tribes (Tribes) on a redline amendment for the underlying bill. If that language were to be adopted, the Department could support the bill.

I. Introduction

Before I begin discussing this settlement, I want to note that the Department supports the policy that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Indian water rights settlements have the potential to resolve long-standing claims to water, provide certainty to water users, foster cooperation among water users within a watershed, allow for the development of water infrastructure, promote tribal sovereignty and self-sufficiency, and improve environmental and health conditions on Indian reservations.

The framework the Department follows to guide the negotiation of Indian water rights settlements, and the support for legislation to authorize these settlements, includes four general principles set forth in the *Criteria and Procedures*, 55 Fed. Reg. 9223 (Mar. 12, 1990). First, settlements must be consistent with the United States' trust responsibilities. Second, Indian tribes must receive equivalent benefits in exchange for the rights they, and the United States as trustee, release as part of a settlement. Third, Indian tribes must obtain the ability to realize value from confirmed water rights. Fourth, settlements must contain an appropriate cost-share by all parties benefiting from the settlement.

The Tribes have long been leaders in water and natural resources management. They have restored the ecosystem function of miles of streams; with the State of Montana, they co-manage the fishery on Flathead Lake, the largest freshwater body west of the Continental Divide; and

they also operate the Selis Ksanka Qlispe Dam at Flathead Lake under a Federal license for producing hydroelectric power.

The Tribes and the State brought significant leadership qualities to negotiating the Confederated Salish and Kootenai-Montana Compact (Compact) approved by the Montana legislature in 2015. The Department commends them for the substantial efforts they have made in negotiating a resolution of the Tribes' water right claims, which have been among the most contentious to be addressed in a tribal water settlement.

II. Historical Context¹

The aboriginal homeland of the Tribes is located in present-day western Montana, northern Idaho, and north into Canada. In 1855, the Tribes and the United States entered into the Hellgate Treaty. Under the Treaty, the Tribes ceded to the United States a significant portion of their aboriginal territory and reserved to themselves the Flathead Indian Reservation (Reservation) in northwestern Montana. The Hellgate Treaty expressly reserved to the Tribes rights of hunting, fishing, and gathering both on- and off-Reservation. In addition, the Treaty recognized the Tribes' right to an agrarian lifestyle based on the extensive lands within the Reservation that are economically viable agricultural lands.

For over a century, there have been extensive and bitter disputes over the Tribes' water rights and resources. The root of many of these conflicts is the 1904 Flathead Allotment Act and subsequent amendments in 1908. The 1904 Act, over objections from the Tribes, directed the allotment of Reservation lands to individual Indians and authorized the disposal of "surplus" unallotted land for non-Indian homestead entry. The 1908 amendment authorized the construction of a greatly expanded irrigation system to serve irrigable lands on the Reservation owned by both Indians and non-Indians. This irrigation system became known as the Flathead Indian Irrigation Project (FIIP). Over the next few decades, FIIP was constructed to irrigate approximately 130,000 acres and currently serves 132,077 acres. By the 1930s, most of the lands allotted to individual Tribal members within FIIP were no longer in Indian ownership. Currently, nearly 90 percent of the lands irrigated by FIIP are owned by non-Indians. The Bureau of Indian Affairs (BIA) owns and operates FIIP.

Much of the irrigation water supply used by FIIP is diverted directly from several streams that also support the Tribes' reserved fisheries, which has created serious conflicts. In a series of interrelated lawsuits in the 1980s, courts conclusively confirmed that the Tribes are entitled to instream flow water rights sufficient to support fishery resources and the Tribes' treaty-reserved fishing rights. The courts further found that these reserved instream flow rights have a priority date of time immemorial and thus are senior to the irrigation water rights for FIIP. Since the 1980s, there has been an impasse on the Reservation between the need for instream flows for

¹ For a more complete statement about the Tribes' history, please see the Department's 2016 testimony on S. 3013, Salish and Kootenai Water Rights Settlement Act of 2016, available at: <https://www.doi.gov/ocl/s-3013>.

fishery purposes and irrigation demands. The BIA continues to operate FIIP, information developed over many years indicates that the existing minimum flow protections are not adequate. Population growth on and near the Reservation over the past few decades has also increased the demand for water resources, further exacerbating these conflicts. The Tribes and the United States also asserted numerous senior water rights claims off the Reservation that create uncertainty about current and future water uses across a large section of Montana.

III. Salish and Kootenai Water Rights Compact and Proposed Legislation

A. Negotiations

Seeking to avoid costly litigation, provide certainty for all water users, and meet the needs of all parties, the State of Montana, the Tribes, and the United States have engaged in decades of negotiations. These negotiations resulted in the Compact, which was approved by the Montana legislature in 2015. The Compact is a comprehensive resolution of all the Tribes' water right claims and includes irrigation, domestic, instream flow, and other water rights to meet the Tribes' current and future needs on the Reservation. Off-reservation water right claims are also resolved as discussed below.

B. S. 3019

S. 3019 would authorize, ratify, and confirm the Compact, and provide funding for its implementation. The bill would provide \$1.9 billion to be used for a number of purposes, including: rehabilitation and modernization of the FIIP; mitigation of damages to natural resources; administration and implementation of the Tribal water rights; construction of livestock fencing; installation of devices to prevent fish entrainment; construction and maintenance of community water distribution and wastewater facilities; and repair and replacement of certain culverts, bridges and roads. It would ratify the Tribal water right and, in conformance with the Compact, would direct the Secretary to allocate to the Tribes 90,000 acre-feet per year of storage water from Hungry Horse Reservoir "for use by the Tribes for any beneficial purpose on or off the Reservation." The Compact also provides a unique and carefully crafted framework for the administration of water rights on the Reservation through the Unitary Administration and Management Ordinance (or Law of Administration), which proscribes the process to 1) register existing uses of water; 2) change water rights; and 3) provide for new water development. In a November 18, 2019 letter to Senator Daines, Secretary of the Interior David L. Bernhardt set out the conclusions of the Department that the Compact would appropriately resolve the FIIP water supply and the Tribes' water right claims and that the Unitary Administration and Management Ordinance is protective of the rights of both non-Indian and Indian water right holders on the Reservation.

In exchange for the benefits of S.3019, the Tribes would waive and release all their water rights claims and claims against the United States related to water rights, natural resource damages, operation and maintenance of the FIIP, and other potential claims.

S. 3019 provides significant and important benefits to the economy of the Reservation and the State of Montana. Significantly, by ratifying the Compact, S. 3019 protects valid existing non-Indian water uses and commits to meet “Historic Farm Deliveries” for irrigators served by FIIP. In so doing, the bill provides substantial benefits to non-Indian irrigators by keeping them “whole.” The United States and the Tribe have filed extensive water claims in the general stream adjudication underlying this settlement. Absent settlement of those claims, the amount of water available to FIIP irrigators may be reduced so substantially as to render FIIP nonviable. It is expected that loss of water would result in a conversion of irrigated agriculture to lower-valued dryland agriculture on the Reservation. This conversion could result in a reduction of net returns to farming of approximately \$356 million in present value terms over 50 years.

The United States will not be able to simply walk away from a nonviable FIIP but would likely have to decommission it in order to protect lives and property. FIIP delivers water through nearly 1,300 miles of canals and laterals. There are about 10,000 structures, which include 17 dams and storage reservoirs. The reservoirs have a combined capacity of approximately 160,500 acre-feet. There are three major pumping facilities that help to supplement water supplies in portions of FIIP. FIIP consists of four management divisions: the Jocko Division (about 11,000 irrigated acres), the Camas Division (about 13,000 irrigated acres), the North Division (about 52,000 irrigated acres), and the South Division (about 52,000 irrigated acres). Estimates of the cost for the United States to decommission FIIP exceed a billion dollars.

The benefits of S. 3019 are not limited to on-Reservation farming. Nearly all of these claims recognized in the Compact are being relinquished by the Tribe under the terms of the bill. The Tribe and the United States also filed water rights claims in off-Reservation streams in western and parts of eastern Montana. If successfully litigated, these claims could result in reduced water deliveries to irrigators in these areas, resulting in an estimated reduction in off-Reservation irrigator net income of \$146 million in present value over 50 years.

In addition to avoiding losses in farm net income, S. 3019 supports positive economic activity associated with continued irrigated agriculture (on- and off-Reservation), and economic activity expected to occur as a result of the funding provided to the Tribes in the bill. The waiver of water claims contained in S.3019 will allow continued irrigation on-Reservation, with an estimated economic contribution of approximately \$34 million in total annual labor income impacts (including direct farm income mentioned above, and indirect, and induced impacts); representing \$910 million in present value. As for off-Reservation impacts, continued irrigation in eastern and western Montana supports total annual labor income impacts estimated at approximately \$372 million in present value. In total, across all regions of the state, S. 3019 preserves agricultural economic activity that supports total labor income (including direct farm income from above and

indirect, and induced impacts) of approximately \$47 million annually or \$1.3 billion in present value over 50 years.

The Trust Fund created by S. 3019 provides funding for programs that would create economic activity in the regional economy: modernization of FIIP infrastructure (to increase the water use efficiency of the system), restoration of stream channels and return flow sites to enhance fish habitat, and construction of community water systems. These activities support direct, indirect, and induced jobs. Cumulatively, S. 3019 is expected to support approximately 520 permanent jobs on or near the Reservation (of which approximately half are seasonal), and approximately 4,650 temporary construction and restoration jobs through rehabilitating and modernizing FIIP and restoring natural resources damaged by FIIP operations.

IV. Department of the Interior Positions on S. 3019

While the Department has a record of strong support for Indian water rights settlements and supports many elements of the Compact, the Department has concerns with S. 3019 as introduced. The Department supports the level of funding provided in S. 3019, in large part because the Department recognizes that rehabilitating and modernizing FIIP in a way that preserves and increases instream flows while still maintaining the status quo for FIIP irrigators requires substantial costs. However, the Department is concerned that the introduced version of the bill lacks necessary assurances that settlement funds will be spent to sufficiently rehabilitate and modernize FIIP. Given that FIIP will remain in Federal ownership, the Department needs mechanisms in the legislation ensuring that settlement funds will be used for these intended purposes. We believe the negotiated redline addresses this concern.

Another issue of significant concern is the omission in S. 3109 of a prohibition on per capita distribution of settlement funds. The *Criteria and Procedures* that guide the Administration's participation in Indian water rights specifically disapprove of per capita distributions. Virtually all of the 32 enacted Indian water rights settlements include provisions prohibiting per capita distribution. In this settlement, per capita distribution of funds to individual Tribal members would threaten the ability of the Tribes to carry out the essential purposes of the settlement, including rehabilitation and modernization of the FIIP; restoration of damages to natural resources; installation of devices to prevent fish entrainment; and construction and maintenance of community water distribution and wastewater facilities.

S. 3019 as introduced requires several technical corrections to clarify certain provisions and to aid in its implementation. The negotiated redline includes those technical corrections and the Department supports its adoption.

V. Conclusion

S. 3019 and the underlying Compact are the products of a great deal of effort by many parties and reflect a desire by the people of Montana - Indian and non-Indian - to settle their differences

through negotiation rather than litigation. This Administration shares that goal and is committed to finalizing this settlement after many years of hard work between the Tribes, the State, and the Montana congressional delegation to reach a final and fair settlement of the Tribes' water rights claims.

Mr. Chairman, this concludes my written statement. I would be pleased to answer any questions the Committee may have.